United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1059

To Be Argued By
ALAN NEIGHER

B/S.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-1059

UNITED STATES OF AMERICA

Appellee

VS.

THOMAS JOSEPH HERRMANN

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT - APPELLANT

ALAN NEIGHER
855 Main Street, Suite 825
Bridgeport, Connecticut 06604
Counsel for Defendant - Appellant
Thomas Joseph Herrmann

75-1059

To Be Argued By
ALAN NEIGHER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-1059

UNITED STATES OF AMERICA

Appellee

VS.

THOMAS JOSEPH HERRMANN

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT - APPELLANT

ALAN NEIGHER
855 Main Street, Suite 825
Bridgeport, Connecticut 06604
Counsel for Defendant - Appellant
Thomas Joseph Herrmann

TABLE OF CONTENTS

CITATION OF AUTHORITIES

CITATION OF AUTHORITIES

CITATION OF AUTHORITIES

ISSUES PRESENTED

I. Did The District Court Err In Denying Defendant's Motion To Vacate And Correct Sentence Under 28 U. S. C. §2255?

II. Did The District Court Err Under Rule 11, Fed. R. Crim. Pro. In Failing To Inform Defendant That Under 18 U. S. C. §3568, The Court Was Powerless To Impose A Federal Sentence To Run Concurrently With Defendant's State Confinement?

STATEMENT OF THE CASE

This is an appeal from a ruling filed January 3, 1975, by the United States District Court for the District of Connecticut (Clarie, C. J.) denying defendant-appellant Thomas Joseph Herrmann's (herein "defendant") motion to vacate and correct sentence under 28 U. S. C. §2255.

Defendant pleaded guilty on May 13, 1971 to a charge of bank robbery, 18 U. S. C. §2113(a) (8a-17a).[1] He and an accomplice, George B. Buchanan, were charged in a three-count indictment with the armed holdup of the Union Trust Company in Georgetown, Connecticut, on August 14, 1970. Buchanan was subsequently sentenced by the District Court (Zampano, J.) to serve 11 years.

Defendant was sentenced (Clarie, C. J.) on September 27, 1971 to serve 11 years to run consecutively to two state sentences totalling 5 to 7 years. After sentencing on the federal charge, the Government dismissed the other two counts in the indictment. Defendant subsequently moved for modification of sentence under Rule 35, Fed. R. Crim. Pro. which motion was heard and denied by the District Court (Clarie, C. J.) on

---

1. Parenthetical references are to the appendix to this brief, the contents of which have been approved by the Government pursuant to Rule 30(b) of the Federal Rules of Appellate Procedure.

December 20, 1971 (34a-43a).[2]

On October 28, 1974 defendant moved to vacate and correct sentence under 28 U. S. C. §2255 (44a-45a) claiming: (1) that his sentence was imposed after consideration by the court of one or more prior convictions of defendant made invalid under Gideon v. Wainright, 372 U. S. 335 (1963); (2) that his sentence was imposed after the court made certain assumptions concerning defendant's criminal record which were materially untrue; and (3) that his sentence was imposed after consideration by the court of certain other misinformation.

Hearing on the §2255 motion was held on December 9, 1974 (46a-98a). The Government did not oppose the motion, and, in fact, indicated that the motion might have merit (97a).

In a ruling dated January 3, 1975 (99a-102a) Judge Clarie denied the motion.

On January 11, 1975 defendant appealed to this Court.

---

2. On September 3, 1974 defendant again moved pursuant to Rule 35, Fed. R. Crim. Pro. for modification or suspension of sentence, which motion was heard and denied by the District Court (Clarie, C. J.) on October 15, 1974. Notice of appeal dated October 25, 1974 from denial of this latter motion was filed. However, this appeal was subsequently withdrawn pursuant to a stipulation for dismissal, entered by this Court on March 14, 1975.

STATEMENT OF FACTS

The essential facts are as follows:

A. Facts Related to Defendant's §2255 Claim

The presentence report prepared subsequent to defendant's change of plea referred to defendant's conviction of breaking and entering in Jacksonville, North Carolina on February 20, 1962, resulting in defendant being sentenced to 120 days on a chain gang and "an undesirable discharge from the U. S. Marine Corps." (25a, 26a). The Court referred to defendant's service in the Marine Corps in its denial of defendant's first motion for modification of sentence (41a). At the December 9, 1974 hearing on defendant's §2255 motion, defendant testified that at the time of his larceny conviction in North Carolina, he was indigent, and was not allowed an opportunity to call an attorney, nor was he represented by an attorney, prior to his being sentenced to four months on a chain gang. Subsequent to that conviction, the Marine Corps mailed an undesirable discharge to defendant at the work camp (63a-66a).

At sentencing (31a) and at hearing on defendant's first motion for modification of sentence (39a) the District Court referred to defendant's conviction in 1964 for trespassing in Greenwich, Connecticut. At the December 9, 1974 hearing, defendant testified that he was not represented by counsel, nor could he afford counsel, prior to pleading guilty to that charge (66a).

The presentence report described defendant's 1964 manslaughter conviction as involving "what police described as a narcotics transaction..." (21a). The district judge referred to the alleged "narcotics transaction" at defendant's first motion for modification of sentence (39a-40a). At the December 9, 1974 hearing defendant testified that one week prior to the manslaughter incident, his house had been burglarized. Two men burst into his door, and defendant fired. There was no question at defendant's trial of this being a narcotics transaction, nor was any "narcotics transaction" ever shown by the police to have occurred (67a-68a). In denying defendant's motion to vacate and correct sentence, the district judge stated that defendant's "record discloses that he had the propensity to kill..." (101a).

The presentence report described a larceny conviction in 1963 as follows:

> the defendant was arrested on October 22, 1961... the defendant and two other men riding through New Jersey picked up an 18 year old hitchhiker and began to abuse him. Finally, they stopped the car, got out and began slapping the young hitchhiker who offered them money to leave him alone. They took $12 out of the victim's wallet, threw the wallet back to him and left him lying on the ground and rode away. When the case came to trial on May 8, 1963, the charge of robbery had been dismissed and the defendant entered a plea of guilty to the larceny charge. (20a).

Almost verbatim reference was made to this portion of the presentence report by Judge Clarie at defendant's first motion for modification of sentence (39a). At the hearing of

December 9, 1974 defendant testified that the victim was known to the other two men with defendant, and that the crux of the incident involved a fist fight between two of the men, in which defendant played no part in abusing or robbing the hitchhiker. Further, the three defendants were represented by the same attorney, and that a "package deal" providing for misdemeanor pleas was dispositive of the entire incident as to all three defendants. (69a-71a).

At defendant's sentencing, the District Court was apparently of the impression that defendant came from a sound family background. The Court noted: "...you came apparently from a good family. It says here your father was at one time a Stamford Police Officer..." (31a). However, the presentence report disclosed that defendant's father was "a very harsh and severe disciplinarian and the relationship between the two deteriorated" (22a); that a psychological examination revealed that defendant "had strong guilt feelings and had been exposed to excessive criticism at home..." (24a). These conclusions were affirmed at the December 9, 1974 hearing by defendant's mother, who described in detail the harsh and brutal treatment defendant received from his father. (77a-82a).

B. Facts Relating To Defendant's Claim Under Rule 11

At defendant's change of plea on May 13, 1971 Judge Clarie was informed that the defendant was presently in state custody

on sentences of 5 to 7 years (15a-17a). However, Judge Clarie, in questioning defendant, did not inquire as to whether defendant was aware that as a consequence of his plea to the federal charge, the Court was powerless to impose a sentence to run concurrently with defendant's state sentence (8a-17a).

At sentencing on September 27, 1971 defendant's counsel and defendant each requested Judge Clarie to impose defendant's federal sentence concurrently with defendant's state sentence (30a). The Court did not inform defendant that it was powerless to impose a federal sentence to run concurrently with the state sentence (28a-32a).

At hearing on defendant's first motion for modification of sentence on December 20, 1971 counsel for defendant again asked Judge Clarie to impose sentence to run concurrently with the state sentence (37a, 38a). In denying the motion, Judge Clarie again failed to inform defendant that he was powerless to impose the federal sentence to run concurrently with the state sentence (38a-42a).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO VACATE AND CORRECT SENTENCE UNDER 28 U. S. C. §2255.

The issue here is defendant's due process right not to be sentenced after the district judge - however inadvertantly - considered (1) prior conviction made invalid under Gideon v. Wainright, 372 U. S. 335, and (2) materially untrue assumptions concerning defendant's record and background.[3]

In Townsend v. Burke, 334 U. S. 736 (1948) defendant challenged the fairness of the sentencing process where the trial judge had relied on apparently erroneous information in assessing sentence. In granting the requested habeas relief, the Supreme Court stated:

> "[t]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U. S. at 74.

The rule in Townsend was reaffirmed by the Supreme Court in United States v. Tucker, 404 U. S. 443, 447, (1972). The

---

3. In defendant's §2255 motion to vacate and correct sentence dated October 28, 1974 (44a-45a) heard by Judge Clarie on December 9, 1974 defendant set forth three grounds in support of his motion. The first concerned invalid prior convictions under Gideon, supra. The second involved assumptions concerning defendant's prior criminal record which were materially untrue. The third concerned "other misinformation". For purposes of this appeal, the second and third claims will be treated together under Part B, below.

Court restated with approval the rule in Townsend, and affirmed the decision of the Ninth Circuit in remanding for resentencing where the sentencing judge had considered defendant's prior conviction in which defendant had not been represented by counsel.

Even prior to the decision in Tucker, this Court extended the rule in Townsend beyond the issue of lack of counsel. In United States v. Malcolm, 432 F. 2d 809 (2d Cir. 1970) this Court held:

> "Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material fase assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." (citing Townsend, supra) 432 F. 2d at 816.

This Court's holding in Malcolm has been cited as authority both within[4] and without[5] this Circuit.

It is defendant's claim that the district judge imposed sentence after consideration of (1) prior convictions of defendant made invalid under Gideon and Townsend, and (2) material false assumptions as to facts relevant to sentencing. Defense counsel did not have the opportunity to rebut this information

---

4. See Lupo v. Warden, 371 F. Supp. 156, 160 (D. Conn. 1974).

5. See e. g. United States v. Powell, 487 F. 2d 325, 329 (4th Cir. 1973); United States v. Espinozoa, 481 F. 2d 553, 556-557 (5th Cir. 1973); Nardone v. Mullen, 322 A. 2d 27,29 (R.I. 1974).

prior to sentencing.[6]

A. Consideration By The District Court of Prior Conviction Made Invalid Under Gideon and Townsend.

1. The 1962 Larceny Conviction.

The presentence report referred to defendant's conviction of breaking and entering in Jacksonville, North Carolina on February 20, 1962, resulting in (1) defendant being sentenced to 120 days on a chain gang, and (2) defendant receiving an undesirable discharge from the U. S. Marine Corps. (25a,26a). At defendant's first motion for modification of sentence, the Court referred to defendant's service in the Marine Corps (41a). At the December 9, 1974 hearing on defendant's §2255 motion, it was undisputed that at the time of the North Carolina larceny conviction, defendant was indigent, was not allowed to call an attorney, and was not represented by counsel prior to being sentenced to four months on a chain gang, which resulted in his undesirable discharge from the Marine Corps. (63a-66a).

2. The 1964 Trespassing Conviction.

At sentencing (31a) and at hearing on defendant's first

---

6. At the time of defendant's plea and sentencing, presentence reports were not available for inspection by defense counsel in the District of Connecticut. This policy changed on February 2, 1973 with the adaptation of a local rule which provided that the presentence report "shall be available for inspection by defense counsel and the prosecuting attorney on the Friday prior to sentencing...." Certain "confidential information" may be excluded subject to the approval of the sentencing judge.

motion for modification of sentence (39a), Judge Clarie referred to defendant's conviction in 1964 for trespassing in Greenwich, Connecticut. At the December 9, 1974 hearing on defendant's $2255 motion, it was undisputed that defendant was not represented by counsel, nor could he have afforded counsel prior to pleading guilty to the charge (66a).

In his opinion denying defendant's motion to vacate and correct sentence, Judge Clarie did not deny that the two convictions were unconstitutional. However, he wrote that these convictions "were comparatively inconsequential in (defendant's) overall record, and in fact, had no material bearing on the ultimate sentence imposed" (100a-101a). Judge Clarie concluded that these convictions "did not in any way affect the Court's sentence" (191a-102a).

It is not contended that defendant's prior record was pristine. But it is clear that (1) these two convictions were before the Court at the time of sentencing; (2) the North Carolina conviction led to defendant's undesirable discharge from the Marine Corps, the fact of which discharge was set forth twice in the presentence report (25a,26a); (3) the Greenwich trespassing conviction was again considered by the Court in denying defendant's first motion for modification of sentence; and (4) these two convictions were invalid for purposes of sentencing under Gideon, Townsend, and Tucker, supra.

B. Other Assumptions Made By The District Court Which Were Materially Untrue.

1. The 1964 Manslaughter Conviction.

The presentence report (21a) described defendant's 1964 manslaughter conviction as involving "what police described as a narcotics transaction". Judge Clarie referred to the alleged "narcotics transaction" at defendant's first motion for modification of sentence (39a-40a). However, at the December 9, 1974 hearing, defendant described how two men had burst into his apartment one week after his home had been burglarized; that there was no question at his trial of this being a narcotics transaction; and that no "narcotics transaction" was ever shown by the police to have occurred (67a-68a). Nevertheless, in denying defendant's motion to vacate and correct sentence, Judge Clarie ignored the undisputed facts surrounding the incident and wrote that defendant's "record discloses that he had the propensity to kill" (101a).

2. The 1963 Larceny Conviction.

The presentence report (20a) referred to an incident involving a larceny conviction in New Jersey in 1963, in which defendant, with two others, allegedly robbed, beat and abandoned a young hitchhiker. Almost verbatim reference to this incident was made by Judge Clarie at defendant's first motion for modification of sentence (39a). At the hearing of December 9, 1974 it

was undisputed that the victim was in fact an acquaintance of the two men with defendant, and that the incident involved a fist fight between one of the men and the victim. Defendant played no part in abusing or robbing the hitchhiker. Further, the testimony showed that three defendants were represented by the same attorney, and that a "package deal" providing for misdemeanor pleas was dispositive of the entire incident as to all three defendants (69a-71a).

3. Defendant's Family Background.

At defendant's sentencing, Judge Clarie concluded that defendant came from a sound family background. He noted..."you came apparently from a good family. It says here your father was at one time a Stamford Police Officer..." (31a).

However, the presentence report also disclosed that defendant's father was "a very harsh and severe disciplinarian and the relationship between the two deteriorated..." (22a); that psychological examination revealed that defendant "had very strong guilt feelings and had been exposed to excessive criticism at home..." (24a); and that he had been treated "exceptionally severely" by his father (26a). These conclusions were affirmed at the December 9, 1974 hearing by defendant's mother who described in detail the father's harshness and brutality, and the effect of this treatment on the defendant (77a-82a).

Despite extensive testimony on these facts at the December 9, 1974 hearing, Judge Clarie did not consider them in his ruling of January 3, 1975, except to note a passing reference to defendant's claim "that the Court made certain assumptions concerning (defendant's) criminal record which were materially untrue" (100a).

It is submitted that the record in this case requires that defendant's sentence be vacated and that defendant be resentenced.

Taken together with the two invalid convictions which were part of the record before Judge Clarie at sentencing, the materially untrue assumptions concerning defendant's criminal record[7] and family background added significant elements of lawlessness to defendant's history which may have presented defendant in "a dramatically different light at sentencing." United States v. Tucker, supra, 404 U. S. at 448; Clay v. Wainright, 470 F. 2d 478, 484 (5th Cir. 1972).

Here, the 1964 manslaughter conviction of defendant, (first termed by Judge Clarie, in the words of the presentence report, as "involving a narcotics transaction") was in fact shown not to have involved narcotcs, but was instead a breaking and entering into defendant's apartment. Upon a showing of the circumstances of the shooting, Judge Clarie ignored the refutted

---

7. This Court has recognized the critical importance of past criminal activity in the sentencing process. United States v. Needles, 472 F. 2d 652, 655 (2d Cir. 1973); United States v. Doyle, 348 F. 2d 715 (2d Cir.), cert. den., 382 U. S. 843 (1965).

"narcotics transaction" assumption and interpreted the incident to instead show a "propensity to kill" on the part of defendant. Assumptions concerning the violent aspects of defendant's participation in the New Jersey larceny conviction, set forth in the presentence report, and which Judge Clarie again considered at the time of defendant's first motion for modification of sentence, were later shown to be materially false. Again, the District Court ignored the rebutted assumption in its §2255 ruling. Finally, while Judge Clarie first thought that defendant came from a "good family", despite the facts set forth in the presentence report, and despite later testimony showing his childhood as marked by cruel and brutal treatment on the part of defendant's father, Judge Clarie again ignored this rebutted and erroneous assumption in denying defendant's §2255 motion.

In United States v. Weston, 448 F. 2d 626 (9th Cir. 1971) defendant was convicted of a narcotics violation. The presentence report contained potentially unreliable hearsay that defendant was a major distributor of narcotics in the area, and the judge imposed a maximum 20 year sentence. The Ninth Circuit vacated the sentence and, in interpreting Townsend, supra, stated:

> "[T]ownsend...made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved." 448 F. 2d at 634.[8]

In interpreting Tucker, the Fifth Circuit, in United States v. Espinozoa, 481 F 2d 553, 555 (5th Cir. 1973) stated:

> "Implicit in the Court's holding in Tucker is the principle that despite the broad discretion left to the trial judge in assessing background information for sentencing purposes...a defendant retains the right not to be sentenced on the basis of invalid premises". (citations omitted)

Here the defendant was originally sentenced on the basis of two unconstitutional convictions and three invalid premises. While Judge Clarie is unquestionably sincere in stating that he now believes that "the original sentence was fair and just" (101a), the record and comments by the district judge indicate that he was influenced by the improper consideration noted above. (See e. g., 20a, 21a, 25a, 26a, 31a, 39a-40a, 41a). Due process cannot be satisfied by a post facto justification for a sentence

---

8. In United States v. Needles, supra, this Court distinguished Weston on the facts. Needles involved a denial by defendant of an allegation in the presentence report that he was "engaged in the widespread manufacture and sale" of firearms. Needle's admissions and other undisputed facts made his story implausible, and the district judge simply chose not to believe him. Here, neither Judge Clarie nor the Government has questioned the invalidity of the prior convictions or defendant's version of the other aspects of his record and background.

that was imposed after consideration of improper factors, Gideon, Townsend, Tucker, Malcolm, supra.

This is not a proper case for remand to Judge Clarie for a statement as to whether or not defendant's sentence was enhanced by consideration of the improper factors noted above, as ordered by this Court in Ferranto v. United States, 507 F. 2d 408, 409 (2d Cir. 1974). Judge Clarie has already made it quite clear that he is not disposed to reconsider defendant's sentence, notwithstanding the infirmities noted above. For this reason, it is submitted that this is a proper case for remand for resentencing by a different judge, as was ordered by this Court in United States v. Brown, 470 F. 2d 285, 288-289 (2d Cir. 1972), citing United States v. Picard, 464 F. 2d 215 (1st Cir. 1972); Mawson v. United States, 463 F. 2d 29 (1st Cir. 1972) (per curiam); Santabello v. New York, 404 U. S. 257 (1971). See also, People v. Hildabridle, 206 N. W. 2d 216, 217-218 (Mich. 1973).

The process suggested above may result in nothing more than the new judge imposing the same sentence as originally imposed, a situation occurring in Brown, 479 F. 2d 1170. But at least a different judge, taking a fresh look at defendant and considering a new, up-dated presentence report, would remove any doubt as to the fairness of defendant's sentence.

II. THE DISTRICT COURT ERRED UNDER RULE 11, FED. R. CRIM. PRO. IN FAILING TO INFORM DEFENDANT THAT UNDER 18 U. S. C. §3568 THE COURT WAS POWERLESS TO IMPOSE A FEDERAL SENTENCE TO RUN CONCURRENTLY WITH DEFENDANT'S STATE SENTENCE.[9]

At defendant's change of plea on May 13, 1971, the District Court was fully aware that defendant was then in state custody on sentences of 5 to 7 years (15a-17a). The record is clear that at the change of plea, Judge Clarie did not inform defendant that as a consequence of defendant's plea of guilty, the Court was powerless to impose a federal sentence to run concurrently with defendant's state conviction (9a-17a).

Defendant's state sentence was also referred to in the presentence report (26a). At sentencing on September 27, 1971, both defendant's counsel and defendant, in addressing the Court, requested that defendant be sentenced concurrently with the state conviction (30a). At no time at sentencing did Judge Clarie inform defendant that he was powerless to impose a federal sentence to run concurrently with the state sentence (28a-32a).

Nearly three months later, on December 20, 1971 defendant moved for modification of sentence. Counsel for defendant addressed the Court as follows:

---

9. This claim was not presented in defendant's previous §2255 motion and has not yet been adjudicated. The undersigned did not consider the issue until the notice of appeal was filed, and the matter was raised for the first time by letter from defendant inquiring as to its merits. However, it is submitted that since this issue presents no factual issue, and since there is no basis for concluding that defendant deliberately avoided presenting the claim, the Court may consider it. Ferranto v. United States, supra, 507 F. 2d at 409.

> "He's going to, in any event, serve quite a lengthy term of years. And this is perhaps one of the hopes that Mr. Herrman could have: that if this sentence were to be ordered to run concurrently, that at least he would still, at the time he got out, perhaps have a reasonable opportunity at obtaining employment...." (36a-37a).

In denying the motion, Judge Clarie again failed to inform the defendant that the Court was powerless to impose sentence concurrently with the state sentence (38a-42a). While Judge Clarie noted that one of the reasons he imposed a lesser sentence than originally considered was the fact that defendant "had time to spend in the state prison..." (39a), neither the judge nor any other party, including counsel, had yet informed the defendant that his federal sentence could not be served concurrently with the state sentence.

Rule 11, Fed. R. Crim. Pro., as amended in 1966, provides that a guilty plea "(must be) made voluntarily with the understanding of the change and the consequences of the plea." 18 U. S. C. §3568 provides in pertinent part: "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory or jail for service of such sentence..." Clearly, defendant's eleven year federal sentence could not begin to run until he was received in federal custody upon release from state custody.[10]

---

10. Defendant was paroled into federal custody on January 4, 1975. Pursuant to arrangement between the Federal Bureau of Prisons and the State of Connecticut, he is being held at the Connecticut Correctional Institution, Enfield.

To briefly summarize, defendant and defendant's counsel did not know that the sentencing judge did not have the discretion to impose a federal sentence concurrent with defendant's state confinement; in fact, the record clearly shows (1) an expectation on the part of both defendant and defense counsel that Judge Clarie did in fact have such discretion (30a, 36a-37a) and (2) a failure on the part of the district judge to inform defendant of his lack of discretion. (9a-17a, 28a-32a, 38a-42a).

Thus, the issue is whether the operation of §3568 is one of the "consequences of the plea" which, under Rule 11, the district judge was required to advise defendant. The issue has apparently not been decided in this Circuit.

In United States v. Myers, 451 F. 2d 402 (9th Cir. 1972) Myers pleaded guilty in 1963 to federal charges, and was sentenced while in California custody, awaiting trial on two state charges. After the federal sentence was imposed, Myers was convicted of the state offenses, and was detained by the state until 1968, when he was paroled into Federal custody. Pursuant to §3568, his federal sentence did not begin to run until he was first received into Federal custody. Myers moved pursuant to 28 U. S. C. §2255 to vacate his sentence on the ground that his guilty plea was not offered with complete knowledge of the consequences. The District Court agreed, and granted the motion. 319 F. Supp. 326 (C. D. Cal 1970).

The Ninth Circuit affirmed, holding that Myers' position was "similar to that of a defendant who is statutorily ineligible for probation or parole, a fact of which the defendant must be informed before a guilty plea may be validly taken..." 451 F. 2d at 405.[11] The Court noted that "Myers had no reason to know" that the sentencing judge did not have discretion to impose a federal sentence concurrent with state confinement. Id.

While Myers has subsequently been hold by the Ninth Circuit not to apply retroactively[12], and has not been followed by the Tenth Circuit[13], it is respectfully submitted that the Myers rationale is sound, and should be adapted by this Court in this case.

This is not an instance of defendant seeking to raise "every conceivable collateral effect" caused by the conviction entered on the plea, Bye, supra, 435 F. 2d at 179, nor is this

---

11. Sentencing judges have been required to advise defendants of ineligibility for probation or parole in the Second Circuit since Bye v. United States, 435 F. 2d 177 (2d Cir. 1970), and this is the majority view among the circuits. See cases enumerated in Moody v. United States, 469 F. 2d 705, 707-708 n. 5, 6 (8th Cir. 1972).

12. Bender v. United States, 478 F. 2d 332, 333 (9th Cir. 1973).

13. Williams v. United States, 500 F. 2d 42, 44 (10th Cir. 1974).

an attempt to require the sentencing judge to "anticipate the multifarious peripheral contingencies which may affect defendant's civil liberties, his eligibility for societal benefits, his civil rights or his right to remain in this country," Michel v. United States, slip op. 523, 531 (2d Cir. Dec. 2, 1974). Rather, this is a situation directly affecting the length of time defendant will have to serve in prison, Bye, supra, 435 F. 2d at 180.

A critical factor is that defendant was demonstrably unaware of the facts he needed to make an assessment prior to entering a plea - he simply did not know when his federal sentence would begin. See Weston, supra, 451 F. 2d at 405. While Judge Clarie was unquestionably aware that the defendant was in state custody throughout the change of plea, sentencing, and the motion for modification of sentence, Judge Clarie never advised defendant that he was powerless to impose a federal sentence to run concurrently with the state sentence, notwithstanding the contrary expectations of both defendant and defense counsel. Thus, even the limited Rule 11 obligation suggested by this Court in Michel, supra, slip op. at 513 - that only the punishment that the sentencing judge is meting out need be understood - was not met here.

The consequence of this plea was that defendant would serve additional years in prison because he clearly had no understanding of what would happen to him when he pleaded to the federal charge, and no one bothered to tell him.

Since this plea was taken on May 13, 1971, after the effective date of McCarthy v. United States, 394 U. S. 459 (1969) of April 2, 1969, if this Court rules that the District Court failed to comply with Rule 11 here, the Court must vacate defendant's guilty plea. Any post-conviction hearing into the sufficiency of the plea would be superfluous. George v. United States, 421 F. 2d 128, 130 (2d Cir. 1970).

CONCLUSION

For all of the reasons set forth herein defendant's guilty plea and sentence May 13, 1971 should be vacated, and defendant should be allowed to plead again to counts one through three of the indictment returned October 29, 1970. If the Court does not agree with the claim raised in Part II (p. 17, supra, et seq.) then, at the very least, defendant's sentence should be vacated and his case remanded for resentencing by a different district judge after preparation of a new pre-sentence report by the United States Probation Office.

Respectfully submitted,

May 12, 1975

ALAN NEIGHER
855 Main Street, Suite 825
Bridgeport, Connecticut 06604

Counsel for Defendant-Appellant
Thomas Joseph Herrmann

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief of Defendant-Appellant have been furnished by first class mail, postage prepaid, to: Peter Clark, Esquire, Assistant United States Attorney, 141 Church Street, New Haven, CT. 06511, this 12th day of May, 1975.

Alan Neigher

ALAN NEIGHER